The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-066

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

The Law Offices of Regina Skyer and Associates, attorneys for respondent, Sonia Mendez-Castro, Esq., of counsel

DECISION

Petitioner (the district) appeals from a portion of the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2010-11 school year, excluding the portion of tuition for services the student received in summer 2010. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Aaron School in a 12:1+2 kindergarten class (Tr. p. 254). The student received two 30-minute pull-out speech-language therapy sessions per week in a group of two and participated in a 30-minute classroom-wide social skills group conducted by the speech-language pathologist once per week (Tr. p. 215; Parent Ex. F at p. 1). He also received two 30-minute pull-out occupational therapy (OT) sessions per week, once individually and once with a peer (Tr. p. 216; Parent Ex. G at p. 1). The Aaron School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 6 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student is described in the hearing record as very social and interested in engaging with others, but as having a significant deficit in the area of pragmatic language (Tr. p. 181). Although verbal, the student has difficulty expanding on a conversation or a topic and will ask

many questions, but does not answer questions asked of him (id.). The student also exhibits impulsivity and has difficulty with self-regulation, maintaining focus and attention, initiating appropriate interaction with others, and developing and communicating ideas in play (Tr. pp. 189, 258; Dist. Ex. 6 at pp. 4, 9). The student reportedly presents with a "weak hand" and exhibits deficits in fine motor, graphomotor, and self-help skills; motor planning; body awareness; sensory integration; and strength and endurance (Dist. Ex. 6 at pp. 6-7). He is described as engaged and learning best when using a multisensory approach, and as benefiting from movement breaks before or after activities to help his engagement (Tr. p. 193). Academically, the student is functioning at a mid-kindergarten level in reading, mathematics, and writing skills (sentence production), and at an early kindergarten level in handwriting skills (Tr. pp. 185-86).

Background

According to his mother, the student was initially evaluated at the age of two through the Early Intervention Program (EIP) and subsequently began receiving home-based speech-language, OT, and special education itinerant teacher (SEIT) services to address developmental delays, hyperactivity, and sensory integration needs (Tr. pp. 265-66). At the age of three, he started attending a nonpublic preschool for typically developing students, but after three or four months the parents placed the student in a district recommended therapeutic preschool where he attended a full-day program and received related services (Tr. pp. 269-70). After two months at the therapeutic preschool, and at the recommendation of the student's private evaluators, the parents removed the student from the preschool and privately procured a home-based program that focused primarily on the student's behavior (Tr. pp. 273-74). The home-based program included 30 hours per week of "heavily language based" 1:1 instruction and a "social recreational program" to address social skills (id.).[1] The student also received 15 to 20 hours per week of SEIT services through the district (Tr. p. 274).

The hearing record reflects that the Committee on Special Education (CSE) convened on March 20, 2009 and developed an individualized education program (IEP) for the student for the 2009-10 (kindergarten) school year (Dist. Ex. 5 at pp. 1-13). The March 2009 CSE determined that the student was eligible for special education programs and related services as a student with autism and recommended placement in a 12-month 6:1+1 special class in a specialized school with related services of OT and speech-language therapy (id. at pp. 1-2, 13). However, the student attended the Aaron School during the 2009-10 school year where he was in a class with eight students and received related services of speech-language therapy and OT (Tr. p. 275; Dist. Exs. 7; 8 at pp. 1-2; 9 at pp. 1-6; 10 at p. 1; 16-17).

On December 9, 2009, a district social worker conducted an observation of the student in his Aaron School classroom in preparation for the student's annual review (Tr. p. 28; Dist. Ex. 10 at pp. 1-2). The observation report reflected that the student was observed during snack time, while listening to his teacher read aloud to the class, and during a magnetic board activity (Dist. Ex. 10 at pp. 1-2). The social worker indicated that the student used spontaneous verbal language to request permission to go to the "cozy corner," to request help from a peer in opening a toy box, and to request a toy to hold during the read aloud (id. at p. 1). She also indicated that on one

[1] The student's mother testified that private evaluations indicated that the student was on the pervasive developmental disorder – not otherwise specified "[(]PDD NOS[)] range," but did not reflect that the student met criteria for a diagnosis of autism (Tr. p. 272; see Dist. Ex. 5 at p. 3).

occasion the student required and responded to redirection, and that although the student was generally able to follow directions given by the teacher, he interrupted the read aloud, made noises during the magnetic board activity, and was consequently removed from the class by the behavior specialist (id. at pp. 1-2). The social worker noted that the student did not participate in the lesson during the observation and that according to the Aaron School behavior specialist, the student was on a "strict behavior program" to increase his ability to stay on task (id. at p. 2). She further noted that at the time of her observation, he was reportedly able to maintain on-task behavior for 6 minutes (id.).

On January 18, 2010, the district contacted the Aaron School and requested information regarding the student in preparation for his upcoming annual review (Dist. Ex. 11). The hearing record reflects that at some point prior to the annual review meeting, the Aaron School provided the district with reports reflecting the student's participation and progress, including a mid-year report, an OT plan, a speech-language therapy plan, and reports reflecting the student's progress toward reading and math goals (Tr. pp. 28-31; Dist. Exs. 7-9; 16-17).

On January 20, 2010, the parents signed a reenrollment contract for the Aaron School for the 2010-11 school year, and on February 17, 2010, the parents signed a contract for the student to attend the 2010 summer program at the Aaron School (Parent Exs. L at p. 1; M). The hearing record reflects that the parents paid installments totaling $8,300 for the student's summer tuition on February 24, 2010, April 28, 2010, and June 30, 2010 (Dist. Ex. N). Payments totaling $45,675 were made on February 2, 2010, June 2, 2010, September 8, 2010, and December 14, 2010 for the student's tuition to Aaron School for the 2010-11 school year (Dist. Ex. J).

A mid-year report dated February 2010 described the student's academic progress at the Aaron School (Dist. Ex. 9 at pp. 1-6). The report reflected that the student had made steady progress acquiring reading readiness skills, developing number sense, identifying size and shape relationships, verbalizing his own ideas, expressing his feelings, and answering comprehension questions given two possible answers (id. at pp. 1-4). The mid-year report also reflected that due to the student's difficulty with attention and focus, self-regulation, and expressive and pragmatic language skills, he required a variety of individualized supports and strategies to ensure his academic and social/emotional progress, including frequent sensory breaks; modified seating and instructional materials; use of the Phonic Ear FM system; visual, verbal, and multisensory cues to increase attention; the "1-2-3 Magic stoplight system" to increase his awareness of his behavior and to assist him with self-regulation; teacher modeling; exaggerated and slowed speech; guided practice; scaffolding of skills; frequent teacher check-ins; and 1:1 adult support to address his language needs, provide clear expectations and consequences for inappropriate behaviors, and provide positive reinforcement for appropriate behavior (id. at pp. 1-2, 4-6). The student was reported to benefit from a highly structured environment and a multisensory approach to learning (id. at p. 2). Socially, the student was reported to love school and interacting with adults and peers, and when he was engaged he was able to participate in classroom conversations (id. at p. 5). Although the student continued to require teacher facilitation to initiate appropriate interactions with others and to answer a friend's questions, the mid-year report reflected that the student's meaningful engagement with his peers had increased and that he had improved his ability to engage in cooperative play (id.).

A report of the student's progress toward the Aaron School kindergarten mathematics curriculum goals for the fall 2009 trimester reflected that the student demonstrated "emerging"

ability in nine of ten goals rated, and that he had "achieved with support" the goal of identifying simple shapes (Dist. Ex. 17). The report also reflected that an additional seven goals had not yet been introduced (id.).

A report of the student's progress toward the Aaron School kindergarten reading curriculum goals reflected that the student had improved his performance on six rated goals from "emerging ability" in the fall 2009 trimester to "achieved with support" in the mid-year trimester (Dist. Ex. 16). The report also indicated that the student demonstrated "emerging" ability in seven goals which had not been introduced during the fall trimester (id.).

On April 13, 2010, the CSE convened for an annual review and to develop an IEP for the student for the 2010-11 school year (Dist. Ex. 6 at p. 1). Meeting attendees included the district representative who also participated as the special education teacher, a district social worker, the parents, and an additional parent member (Tr. pp. 27-28, 31; Dist. Ex. 6 at p. 2). The student's head teacher from the Aaron School participated telephonically (Tr. p. 31; Dist. Ex. 6 at p. 2). The resultant IEP continued the student's classification as a student with autism and recommended a 12-month 6:1+1 special class in a specialized school with related services of two 30-minute individual OT sessions per week, two 30-minute individual speech-language therapy sessions per week, and one 30-minute group (of two) speech-language therapy session per week (Dist. Ex. 6 at pp. 1, 13). The IEP included annual goals and short-term objectives in the areas of mathematics, reading decoding, reading comprehension, writing, motor planning, sensory processing, self-help skills, fine motor and graphomotor skills, pragmatic language and symbolic play skills, attention, auditory and language processing skills, phonemic awareness, and expressive language skills (id. at pp. 6-10). Strategies to address the student's academic and social/emotional management needs included visual aids and manipulatives; a multisensory curriculum; teacher modeling, redirection and prompting; scaffolding; sensory breaks as needed; clear expectations and consequences; positive reinforcement for appropriate "student" behavior; frequent teacher check-ins; and shortened time periods for participation (id. at pp. 3-4).

In a letter dated June 15, 2010, the parents informed the district of their intent to unilaterally place the student at the Aaron School for the 2010-11 school year and requested transportation to the nonpublic school commencing on the first day of classes (Dist. Ex. 1 at pp. 1-2). The parents indicated that they were rejecting the April 2010 IEP on procedural and substantive grounds, including that they had not received notification of the student's assigned school despite the fact that a 12-month program had been recommended (id. at p. 2). The parents indicated that the student would remain at the Aaron School until an appropriate placement was recommended for him by the CSE (id.).

In a letter dated June 22, 2010, the district summarized the recommendations made by the CSE in the student's April 2010 IEP and notified the parents of the school to which the district assigned the student (Dist. Ex. 12).

The hearing record reflects that the student attended the Aaron School for summer 2010 (Tr. p. 176; Parent Ex. O).

In a letter dated August 8, 2010, the student's mother informed the district that she had visited the assigned school on August 4, 2010 and determined that it was inappropriate to meet the student's special education and social/emotional needs (Parent Ex. I; see Tr. p. 306). Stated reasons

included that it was too far away and that the other students in the class were nonverbal and significantly lower functioning than the student (Parent Ex. I). The student's mother indicated that the student was "completely verbal and highly social" and required appropriate socialization and speech models, which were not provided in the 6:1+1 classrooms she observed (id.). For these reasons, the student's mother stated that she was rejecting the assigned school (id.).

The hearing record reflects that the student attended the Aaron School for the 2010-11 school year (Tr. p. 176; Parent Ex. K).

Due Process Complaint Notice

The parents filed a due process complaint notice dated September 15, 2010, in which they alleged that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds for the 2010-11 school year (Dist. Ex. 18).

The parents filed an amended due process complaint notice dated October 28, 2010, in which they alleged, among other things, that (1) the April 2010 CSE was improperly composed because no regular education teacher attended the meeting; (2) the CSE did not rely on the necessary evaluations to properly gauge the student's current skill levels; (3) the resultant IEP failed to meet all of the student's educational and emotional needs; (4) the CSE failed to conduct a functional behavioral assessment (FBA) and create an appropriate behavioral intervention plan (BIP) for the student; (5) the CSE failed to develop goals targeting the student's behavioral challenges; (6) the CSE failed to recommend counseling as a related service; (7) the CSE failed to recommend parent training and counseling as a related service on the IEP; (8) the district's assigned classroom was inappropriate for the student as it would not have provided a suitable functional peer group for him; and (9) the CSE recommended an assigned school that was too far from the student's home (Dist. Ex. 3 at pp. 2-5). The parents also alleged that the student's placement at the Aaron School was appropriate for the 2010-11 school year and that there were no equitable considerations that would bar reimbursement of tuition (id. at p. 5). The parents sought reimbursement for the costs of the student's tuition at the Aaron School as well as the continuation of door-to-door busing (id. at p. 1).

Impartial Hearing Officer Decision

An impartial hearing convened on January 12, 2011 and concluded on March 3, 2011, after three days of proceedings (Tr. pp. 1-357). In a decision dated May 10, 2011, the impartial hearing officer determined that the district did not offer the student a FAPE because it "significantly impeded the [student's] right to a FAPE and significantly impeded the parent's opportunity to participate in the decision making process" (IHO Decision at p. 16). Specifically, the impartial hearing officer found that the district's recommended program for summer 2010 and the 2010-11 school year did not satisfy least restrictive environment (LRE) requirements (id. at pp. 14-15). He also determined that the assigned district classroom did not satisfy requirements for appropriate functional grouping (id. at p. 15). He also found that the April 2010 CSE did not review any psychological evaluations or speech-language evaluations of the student; that the CSE should have reviewed the previous psychological evaluation to measure the student's progress during the prior year at the Aaron School; that the CSE did not have a special education teacher from the Aaron School on the telephone while discussing the student's educational program, and instead received an oral report from the student's special education teacher and made its own recommendations;

and that it would have been "beneficial" to have the student's special education teacher participate in the meeting while the CSE made its recommendation (id. at pp. 15-16).

Regarding the appropriateness of the Aaron School, the impartial hearing officer initially held that the Aaron School's status as a "for profit" school did not render the school ineligible for reimbursement (IHO Decision at p. 16). The impartial hearing officer then determined that the parents met their burden to show that the Aaron School was appropriate, except for the summer 2010 services that the student received there (id. at pp. 16-18, 19). The impartial hearing officer identified the student's needs and how they were addressed at the Aaron School (id. at pp. 16-17). He also addressed grouping, class size, related services, and the goals at the Aaron School (id. at pp. 17-18). Regarding summer 2010, the impartial hearing officer found that the parents did not call any witnesses from the Aaron School to testify in any meaningful detail about the special education instruction provided, and that testimony showed the summer program consisted of a "traditional summer camp for half a day" (id. at p. 19). The impartial hearing officer also found that there was testimony at the impartial hearing "suggesting that the student did not make any gains during the summer months" (id.).

Regarding equitable considerations, the impartial hearing officer determined that the parents were not precluded from receiving an award of tuition reimbursement for the 2010-11 school year, excluding summer 2010 (IHO Decision at pp. 19-20). Accordingly, the impartial hearing officer ordered the district to reimburse the parents for tuition for the Aaron School for the 2010-11 school year, excluding the tuition paid for summer 2010 (id. at pp. 24-25).

Appeal for State-Level Review

This appeal by the district ensued. The district argues that the portion of the impartial hearing officer's decision that ordered it to reimburse the parents for tuition at the Aaron School for the 2010-11 school year was erroneous. As an initial matter, the district alleges that tuition reimbursement is barred because the Aaron School is a for-profit business and tuition reimbursement is not permitted for that type of school under the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. The district then alleges that it offered the student a FAPE for the 2010-11 school year. Specifically, it alleges that the impartial hearing officer should not have examined whether the recommended 6:1+1 program was the student's LRE because the parents did not raise that issue in their due process complaint notice; however, it further contends that the recommended program was the LRE for the student. The district also alleges that the student would have been appropriately grouped in the assigned classroom. The district alleges that it properly developed the student's IEP, as it reviewed and relied upon a substantial amount of current evaluative information, much of it from the Aaron School. The district contends that the impartial hearing officer's finding regarding the lack of participation by the student's Aaron School special education teacher should be vacated because it was not raised by the parents in their due process complaint notice.

The district also notes that the parents' due process complaint notice contained multiple allegations that were not analyzed by the impartial hearing officer. Regarding those allegations, the district alleges that a BIP was not necessary for the student as the student's behavioral needs would have been addressed programmatically. The district further contends that the CSE did not seriously consider a general education program for the student; therefore, a regular education teacher was not required at the CSE meeting. Next, the district alleges that parent training and

counseling would have been available at the assigned school, regardless of the fact that it was not listed on the IEP.

The district also alleges that the Aaron School was not an appropriate placement for the student and that the impartial hearing officer improperly shifted the burden to the district regarding the appropriateness of the school. Specifically, the district contends that the 12:1+2 ratio in the student's Aaron School class was too large for the student. The district also contends that the Aaron School's goals were not individualized to the student's unique needs and that the student was not appropriately grouped at the Aaron School. Lastly, the district argues that equitable considerations do not favor an award of reimbursement to the parents.

In their answer, the parents deny many of the substantive allegations in the district's petition.[2] The parents allege, among other things, (1) that tuition reimbursement is not barred because the Aaron School is a for-profit school; (2) that the district failed to offer the student a FAPE; (3) that the impartial hearing officer correctly determined that the recommended program was not the student's LRE; (4) that the impartial hearing officer correctly determined that the district's assigned classroom did not meet the requirement for appropriate grouping; (5) that the parents were aggrieved by the failure of the CSE to include evaluative information in the student's IEP; (6) that the psychological evaluation was not reviewed or referenced in the IEP; and (7) that the student's special education teacher at the Aaron School did not participate in the discussion regarding placement.

The parents also allege that the Aaron School is appropriate for the student, that they cooperated with the CSE in developing the student's IEP, and that their signing of a contract with the Aaron School does not prove unwillingness to consider a public school placement. The parents attach additional evidence to their answer and request that it be considered on appeal. In sum, the parents request that the impartial hearing officer's decision be upheld.

The district submitted a reply, requesting that the additional evidence attached to the parents' answer not be considered on appeal.

Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

[2] The parents do not cross-appeal the impartial hearing officer's finding that they are not entitled to tuition reimbursement for summer 2010 at the Aaron School. Therefore, that aspect of the impartial hearing officer's decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Procedural Matters

Additional Evidence

Preliminarily, I will address the parents' submission of two documentary exhibits as additional evidence with their answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 10-096; Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The attached exhibits could not have been entered at the time of the impartial hearing as they were created subsequent to that time (see Answer at Proposed Exs. i; ii). However, neither of these documents pertain to the school year at issue and I agree with the district that they are not necessary in order to render a decision in this appeal; therefore, I decline to consider them.

Scope of Review

The district also contends that the parents allege for the first time on appeal that the district did not show that its recommended program was the student's LRE and that the student's Aaron School special education teacher did not participate for the duration of the student's CSE meeting. According to the district, these claims must be dismissed because they are not properly before a State Review Officer. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R.

§ 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' amended due process complaint notice, I find that it may be reasonably read to raise the issue that the district's program was not the student's LRE (Dist. Ex. 3 at pp. 4-5); therefore, I will address this issue on appeal. However, the parents' amended due process complaint notice cannot be reasonably read to raise the issue of the participation of the student's Aaron School special education teacher at the CSE meeting (see Dist. Ex. 3). Therefore, the impartial hearing officer erred in sua sponte raising this issue.[3]

Moreover, State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Here, the parents asserted additional allegations in their amended due process complaint notice and in their answer, that were not addressed in the impartial hearing officer's May 2011 decision (see Dist. Ex. 3 at pp. 2-5). However, a review of the parents' answer indicates that they did not cross-appeal from the impartial hearing officer's decision. Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal.[4] Accordingly, the parents' additional arguments set forth in their due process complaint notice and answer that were not addressed by the impartial hearing officer will not be considered on appeal.

April 2010 IEP

Evaluative Data

The district appeals the impartial hearing officer's findings that the April 2010 CSE did not review any psychological evaluations or speech and language evaluations of the student, and that

[3] Although this issue was not properly raised in the parents' due process complaint notice, I have reviewed the hearing record and am not persuaded that the telephonic participation of the student's special education teacher for less than the entire duration of the April 2010 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Here, the hearing record reflects that the student's special education teacher participated in the CSE meeting, discussing the student's deficits and strengths, and that the student's mother testified that the special education teacher was an "integral part" of the CSE's discussion (Tr. pp. 213, 278-79).

[4] An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

the CSE should have reviewed the student's previous psychological evaluation to measure the student's progress during the prior year at the Aaron School. More specifically, the district alleges that it properly developed the student's IEP as it reviewed and relied upon a substantial amount of current evaluative information. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

The hearing record reflects that prior to the April 2010 meeting, the CSE reviewed reports from the Aaron School including a February 2010 mid-year classroom report that described the student's progress academically, socially, and behaviorally, and reflected the strategies and supports that the student required to be successful in the classroom; October 2009 speech-language therapy and OT plans that reflected the student's then-current speech-language and OT goals; progress reports reflecting the student's progress toward reading and math goals for the fall 2009 and 2009-10 mid-year trimesters; and the student's previous IEP dated March 2009 (Tr. pp. 28-31; Dist. Exs. 5; 7-9; 16-17). Testimony by the district representative who attended the April 2010 CSE meeting indicated that the reports from the Aaron School were comprehensive and served as the basis for the information in the present levels of performance on the student's resultant IEP (Tr. p. 49). Contrary to the impartial hearing officer's finding, the prior March 2009 IEP that was reviewed by the April 2010 CSE included information from a 2007 psychological evaluation, a 2008 developmental-behavioral pediatric evaluation, and a 2008 psychological evaluation (Dist. Ex. 5 at p. 3). Testimony by the district representative indicated that in determining an appropriate program for a student, "everything is considered," not only test results for academic and cognitive functioning, but also the student's behaviors and information provided in progress reports from the student's school (Tr. pp. 57-59). The hearing record also reflects that the district conducted a classroom observation of the student on December 9, 2009 as part of the student's annual review (Dist. Ex. 10 at pp. 1-2). In addition, as noted above, the hearing record reflects that the student's head teacher at the Aaron School participated in the CSE meeting and was given full opportunity to describe the student's weaknesses, deficits, and strengths; and that she provided input to the discussion regarding the student's progress, goals, and academic functioning and abilities (Tr. pp.

213, 278-79). Accordingly, I find that the CSE reviewed sufficient evaluative information at the time of the April 2010 CSE meeting.

Assigned Class

Functional Grouping

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New

York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]), and it is not asserted on appeal that the student's IEP is not appropriate. If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case, I agree with the district's argument on appeal that the issue of the functional levels of the students in the assigned classroom is in part speculative because the parents did not enroll the student in the public school and therefore the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the assigned classroom.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record does not support the impartial hearing officer's finding that the district's 6:1+1 special class at the assigned district school would not have provided the student with suitable grouping. The impartial hearing officer found that the district did not show that its recommended programs had a "sufficient amount of students who have the ability to engage [the student] in conversation;" therefore, the district did not demonstrate that the student would have been appropriately grouped in its assigned class because the student required other students in the class who were verbal (IHO Decision at p. 15). Initially, I note that the impartial hearing officer appears to have based her finding on the composition of the assigned 6:1+1 class that the student would have attended during summer 2010 (id.). Moreover, although the student's mother indicated that during her one hour visit to the assigned school she did not observe students speaking or interacting with each other in either of the two classes she visited, I note that she testified that she only observed each of the classrooms for three to five minutes and could not indicate whether the other students were unable to speak (Tr. pp. 301-04). In contrast to the impartial hearing officer's finding, the teacher of the assigned summer classroom testified that she had three students in her class that were verbal; two students who were able to label colors, numbers, shapes, and items in the environment, and could "state something" to indicate what a story was about (Tr. pp. 66, 98, 117-18). She further testified that the third student had "excellent language" and "very good conversational skills" and was able to hold "a conversation with all the adults and all the other students, as much as they were able to, in the classroom" (Tr. pp. 114, 118). With regard to academic functioning levels, the teacher testified that similar to the student's level of academic performance (prekindergarten to kindergarten), three of the students in her summer class were at a prekindergarten level and three students were at a kindergarten level (Tr. pp. 99-100, 117; Dist. Ex. 6 at p. 3). The teacher in the assigned summer class testified that also like the student in the instant case, the students in the classroom were all classified as students with autism and were between five and seven years of age (Tr. p. 99). The hearing record further indicates that the students in the assigned summer class had related service needs and academic and social/emotional management needs similar to the student's as reflected in his IEP, including the need for speech-language therapy and OT, sensory breaks, teacher modeling, visual aids and manipulatives, and behavioral supports (compare Tr. pp. 61, 102, 107, 109-10, 113, with Dist. Ex. 6 at pp. 3-4). Accordingly, I will annul the impartial hearing officer's finding that the 6:1+1 special, summer class at the assigned district school did not provide the student with suitable grouping for instructional purposes.

Least Restrictive Environment

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993] J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the

inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[5]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, the hearing record does not reflect that the parties are in disagreement that the student requires a special class setting. Moreover, I note that the parents unilaterally placed the student in a special education school (Tr. p. 174; Dist. Ex. 1 at p. 1). As such, the first prong of the Newington LRE test is resolved as the student could not have been satisfactorily educated in a general education classroom, with the use of supplemental aids and services. I will therefore turn to the second prong, whether the district offered mainstreaming opportunities to the student to the maximum extent appropriate (see J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *33 [S.D.N.Y. Mar. 31, 2011]). I note that neither party asserts that the district failed to include the student in school programs with nondisabled students to the maximum extent appropriate, but rather the impartial hearing officer found that because there were no nondisabled students enrolled in the district's assigned 6:1+1 class, the class was therefore too restrictive.[6] The impartial hearing officer misapplied the LRE standard by analyzing the lack of disabled peers in the student's special class instead of examining the extent to which the student was offered opportunities to interact with nondisabled peers. Moreover, I find that the district provided mainstreaming opportunities to the student to the maximum extent appropriate. Testimony by the lead coverage teacher at the assigned school indicated that the special school is located within a larger school building and that students have the opportunity to participate in adapted physical education with general education students (Tr. pp. 65, 74). She testified that the school has inclusion programs and a social skills program, which provides some students with an opportunity to interact with the general education population (Tr. pp. 74-75). She further testified that students in the assigned 6:1+1 special class participate in and are "included or invited in" with the general education students when there are musical and art shows (Tr. p. 75). Testimony by the teacher in the assigned class indicated that the students in her class also go to the cafeteria and eat lunch with the general education students (Tr. pp. 140-41). Accordingly, upon review of the hearing record, I find that at the time of the CSE meeting, the district's recommended placement was designed to mainstream the student to the maximum extent appropriate and therefore, satisfied the mandate that the student be offered a placement by the district in the LRE (see Dist. Exs. 5 at p. 3; 6 at pp. 3-4, 6-11; 7; 8 at pp. 1-2; 9 at pp. 1-6; 10 at pp. 1-2; 16; 17). Having reached this conclusion, along with the previous conclusions above, I will annul the impartial hearing officer's finding that the district denied the student a FAPE for the 2010-11 school year.

[5] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

[6] I note that the recommended 6:1+1 educational placement is a special class and by nature, would not be comprised of any nondisabled students (8 NYCRR 200.6[h]).

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to provide tuition reimbursement for the student's attendance at the Aaron School is hereby annulled.

Dated: **Albany, New York**
August 15 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER